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No. 00-733

In the Supreme Court of the United States

RICHARD NICHOLAS, ET AL.,
PETITIONERS,

v.

SAUL STONE & COMPANY LLC, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LFG, LLC and
ING (U.S.) Securities Futures & Options, Inc.

December 6, 2000

17 pp

Corporate Disclosure Statements as required by Rule 29.6

(1) Saul Stone & Company LLC is not a subsidiary or affiliate of any publicly owned corporation.

(2) First Options of Chicago, Inc. is a wholly owned subsidiary of SLK Acquisition Co., which is a wholly owned subsidiary of SLK Holdings Inc., which is a wholly owned subsidiary of The Goldman Sachs Group, Inc. The common stock of The Goldman Sachs Group, Inc. is listed on the New York Stock Exchange.

(3) LFG, LLC is not a subsidiary or affiliate of any publicly owned corporation.

(4) ING (U.S.) Securities Futures & Options, Inc. is an affiliate of ING Groep N.V., which is a publicly owned, Netherlands-based corporation. The common stock of ING Groep N.V. is listed on the New York Stock Exchange.

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Respondents Saul Stone & Company LLC ("Saul Stone"), First Options of Chicago, Inc. ("First Options"), LFG, LLC ("LFG") and ING (U.S.) Securities, Futures & Options, Inc. ("ING") jointly submit this brief in opposition to the petition for writ of certiorari submitted by Petitioners Richard Nicholas, Lynn Nicholas, Robert M. Blackburn and Cheryl S. Blackburn (collectively, the "Petitioners"). Petitioners seek a writ of certiorari to review a portion of an opinion and order of the United States Court of Appeals for the Third Circuit, which affirmed the district court's dismissal with prejudice of Petitioners' entire Amended Complaint.

In particular, the Petitioners ask this Court to create an implied private cause of action under Bylaw 1101 of the National Futures Association ("NFA") against futures commission merchants and the NFA itself. NFA Bylaw 1101 does not create, and the Commodity Exchange Act does not provide for, any such private cause of action against futures commission merchants[1] and, particularly under the facts and procedural posture of this case, this Court should deny the Petition.

OPINIONS BELOW

Contrary to the statement in Petitioners' brief at 1, the August 7, 2000 opinion of the Third Circuit is reported at 224 F.3d 179 (3d Cir. 2000). The June 30, 1998 decision of the United States District Court for the District of New Jersey (Thompson, D.J.) (Pet. App. 31a-91a) is unpublished.

JURISDICTION

The Respondents agree with the Petitioners' jurisdictional statement. (Cert. Pet. at xi)

STATEMENT OF THE CASE

In the District Court, Petitioners filed a rambling, eleven-count, 63-page First Amended Class Action Complaint (the "Complaint"). The defendants included twelve separate, unrelated institutional clearing firms (the

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[1] Respondents understand that the issue of whether this Court should grant certiorari on the question of whether a private cause of action under NFA Bylaw 1101 may be maintained against the NFA will be separately addressed by the NFA. Accordingly, Respondents do not address that issue here.

"FCM Defendants"[2]), two individuals[3] and even the NFA, which is the association that regulates the futures industry. The central allegations of the Complaint, however, did not address the alleged conduct or actions of any of the defendants. Rather, the Complaint focused at length on the fraud perpetrated upon Petitioners and other investors by non-parties Sigma, Inc., Chuckles Kohli ("Kohli") and N.S. Ramchandran ("Ramchandran").

Chief Judge Anne Thompson, who presided over the Petitioners' case below, also heard separate criminal and civil proceedings against Kohli, Ramchandran and/or Sigma, Inc. (see Pet. App. at 40a):

- *United States v. Kohli*, No. 96-132 (AET) (D.N.J). Kohli pleaded guilty to five counts of federal criminal charges in connection with his commodity futures activities and was sentenced to 75 months' imprisonment on July 17, 1996.

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2 Respondents Saul Stone, First Options, LFG, ING, Smith Barney, Inc., Dean Witter Reynolds, Inc., Prudential Securities Incorporated, Rosenthal Collins Group, L.P., E.D. & F Man International, Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc. are collectively referred to herein as the "FCM Defendants". The FCM Defendants are registered futures commission merchants and members of the NFA.

3 Petitioners' claims against the individually named defendants, Clarence Delbridge and Thomas Stone, were dismissed for lack of jurisdiction by the district court. The Third Circuit Court of Appeals affirmed that dismissal. The Petitioners do not include these individual defendants as parties before this Court. (Cert. Pet. at ii, 8 n.3)

- *Commodity Futures Trading Commission v. Sigma, Inc., Chuck Kohli and N.S. Ramchandran*, Civil Action No. 95-1598 (AET) (D.N.J.). In this action, Judge Thompson appointed a Permanent Equity Receiver for Sigma, Inc. and other related entities. According to the District Court records, on March 29, 1999, Consent Orders for Permanent Injunctions were entered against Defendants Kohli and Ramchandran. In addition, the Consent Order required Kohli to pay the Permanent Equity Receiver $30,000,000.

The Petitioners' Complaint failed to include a specific count for an implied private cause of action under Bylaw 1101 of the National Futures Association ("NFA") against the FCM Defendants. Instead, Petitioners attempted to state claims against the FCM Defendants for violation of the Commodity Exchange Act (Count I), breach of contract (Count II), violation of the New Jersey Uniform Securities Law (Count IV), breach of fiduciary duty (Count VII), negligence (Count VIII), RICO violations (Count IX), fraud and civil conspiracy (Count X) and violation of the New Jersey Consumer Fraud Act (Count XI).[4] Chief Judge Anne Thompson held that none of these eight counts stated a cause of action against the FCM Defendants (or any other defendant).

With respect to the FCM Defendants, the Petitioners appealed only the dismissal of their claims for violation of the Commodity Exchange Act (Count I), breach of contract

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[4] Count III, which purported to state a claim for "bad faith failure to enforce NFA rules", was directed at the NFA. Petitioners omitted Counts V and VI of their original complaint from the Amended Complaint.

(Count II), breach of fiduciary duty (Count VII), negligence (Count VIII) and violation of the New Jersey Consumer Fraud Act (Count XI). The Circuit Court of Appeals for the Third Circuit affirmed the District Court's dismissal of these claims. The Third Circuit explained in detail its rejection of the Petitioners' claims under the Commodity Exchange Act (Pet. App. at 18a-29a) and simply adopted the district court's "cogent and persuasive" reasoning with respect to the remainder of the Petitioners' challenges. (Pet. App. at 29a)

Now, the Petitioners stray from the focus of the arguments they made below and ask this Court to recognize a separate, private right of action for violation of NFA Bylaw 1101. In this effort, however, the Petitioners utterly fail to justify why this Court should grant the requested writ.

REASONS FOR DENYING THE PETITION

Summary Of Argument

Petitioners make no valid effort to meet the standards for a grant of certiorari. Instead, they attempt to conjure up non-existent "conflicts" and simply reargue the alleged merits of their dismissed claims in the context of NFA Bylaw 1101. The petition's disjointed arguments do not provide the "compelling reasons" (Sup. Ct. R. 10) necessary to justify the exercise of this Court's discretion to grant review, and the petition should be denied.

I. The Alleged "Conflicts" Cited By Petitioners Simply Do Not Exist.

The Petitioners' go through analytical contortions to contrive purported "conflicts" which might convince this

Court to grant certiorari. Unfortunately, their strained attempts to divine "conflicts among the judiciary, regulatory bodies, legislative intent and association rule enforcement" (Cert. Pet. at 11) amount to no more than the Petitioners' disagreement with a consistent statutory and regulatory regime applied by the NFA and the courts.

A. The Courts Below Did Not Ignore, And Their Decisions Do Not Conflict With, The Second Circuit's *Peltz* Decision.

Petitioners assert that the Third Circuit and District Court below ignored the Second Circuit's decision in *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997). Petitioners, however, do not provide in their petition – and did not provide in their briefs below – any discussion of the facts or context of *Peltz* or even a specific page citation to the portion of that decision deemed most relevant by the Petitioners. Instead, they cite *Peltz* simply for a general "headnote" proposition:

> Generally, before accepting trades from a third party, the FCM must make a reasonable inquiry into the nature and extent of the individual's authority. *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997).

(Cert. Pet. at 13) See *Peltz*, 115 F.3d at 1088. As Petitioners' own reference suggests, *Peltz* dealt with a future commission merchant's obligations when receiving trade orders from a disclosed third party (Mr. Weingarten), who was trading for the account of a customer (Mr. Peltz). *Peltz*, 115 F.3d at 1085-86. Unlike *Peltz*, the present case involves a "Ponzi scheme designed and executed by Charles Kohli . . .,

Ram Chandran . . . and through various commodity pools collectively known as . . . the 'Sigma Entities' ". (Cert. Pet. at 7) There is no allegation that Messrs. Kohli and Ramchandran and Sigma traded accounts in the Petitioners' names as the Petitioners' disclosed agents.

Perhaps more significant than the absence of any relevant factual parallel between *Peltz* and the present case is the absence of any reference in *Peltz* to NFA Bylaw 1101, the regulatory provision at the core of Petitioners' present arguments. Under these circumstances, the *Peltz* decision could have provided little insight to the courts below in connection with their consideration of NFA Bylaw 1101. Accordingly, Petitioners' attempt to impugn the Third Circuit and District Court for "ignor[ing] *Peltz*" rings particularly hollow. Certainly, given the factual and legal disparities between the matters before the courts below and the matters decided in *Peltz*, Petitioners' assertion that the decisions below are in conflict with *Peltz* is simply nonsensical.

B. The Other Court Decisions Cited By Petitioners Are Entirely Consistent, Not In Conflict, With The Rejection Of Petitioners' Claims.

Having mischaracterized the holding in *Peltz*, Petitioners then point to a number of cases that purportedly conflict with *Peltz* (as misconstrued by Petitioners) and attempt to minimize or mischaracterize the holdings in those cases that no private right of action exists under NFA Bylaw 1101 or similar provisions. (Cert. Pet. at 13-15) One of the cases, *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1469 (N.D. Ill. 1996), specifically "decline[d] to imply a private cause of action into Bylaw 1101 and its Interpretive Notice." The *Lake States* court correctly relied upon two

other cases, also cited by Petitioners, recognizing that "the Seventh Circuit has previously rejected the proposition that general rules of an exchange organization can be construed to create private rights of action." (emphasis added) *Lake States*, 936 F. Supp. at 1469, citing *Indemnified Capital Invs., S.A. v. R.J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1412 (7th Cir. 1993) (affirming the dismissal of a breach of fiduciary duty claim based on NFA Compliance Rule 2-4) and *Spicer v. Chicago Bd. Options Exch., Inc.*, 977 F.2d 255, 265 (7th Cir. 1992) (refusing to imply a private cause of action for violations of rules of the Chicago Board Options Exchange).

These holdings are consistent with many other decisions rejecting attempts to imply private rights of action pursuant to CFTC regulations or exchange rules. See, *e.g.*, *Unity House, Inc. v. First Commercial Financial Group*, 1997 WL 701345, at *4 (N.D. Ill., Nov. 5, 1997) ("the CFTC and NFA rules do not provide causes of action"), *aff'd*, 175 F.3d 1022 (7th Cir. 1999); *Inter-Asset Finanz AG v. Refco, Inc.*, No. 92 C 7833, 1993 WL 222710, at *4 (N.D. Ill., June 21, 1993) (granting summary judgment for defendant futures commission merchant on claims based upon purported violations of Chicago Mercantile Exchange rules, because "there is no private cause of action for exchange rule violations"); *In re Farmers Group Stock Options Litig.*, No. 88-4994, 1989 WL 73245, at *3 (E.D. Pa., July 5, 1989) ("Courts in this circuit have unanimously refused to recognize any private right of action for violation of a stock exchange rule"); *Birotte v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 468 F. Supp. 1172, 1180, 1184-85 (D.N.J. 1979) (holding that no implied federal right of action exists for alleged violations of Exchange rules).

As these numerous cases make clear, the decisions of the courts below were not in conflict with other courts to the extent they rejected an implied private right of action based upon NFA Bylaw 1101. Indeed, a long line of well-established authority supports the rejection of any such implied private right of action.

C. There Is No Relevant "Conflict Among The Courts And Regulatory Bodies".

Petitioners also suggest that some ill-defined conflict exists "among the courts and regulatory bodies" (Cert. Pet. at 15) with respect to the existence of an implied private right of action under NFA Bylaw 1101. This suggestion appears to be based mainly on *dicta* in a 1987 decision of a CFTC administrative law judge ("ALJ"). (Cert. Pet. at 15, citing *Acampora v. Prudential-Bache Securities Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,792 (C.F.T.C. Aug. 31, 1987)).

In *Acampora*, the ALJ rejected the complainant's claims of breach of fiduciary duty and unauthorized trading. Having done so, the ALJ noted the undisputed fact that the account executive responsible for complainant's account was not registered during the relevant time period due to an oversight by respondents. The ALJ then commented in *dicta* that "[f]ailure on the part of associated persons to be registered . . . may render them liable for any damages resulting from trading activities during the time they are not registered." (emphasis added) The mere suggestion by an ALJ – in *dicta* – that an unregistered associated person "may" be liable for certain damages hardly creates a conflict with respect to the lower court's rejection of an implied private right of action

against futures commission merchants for an alleged violation of NFA Bylaw 1101.

The absence of any meaningful conflict is further highlighted by the CFTC's summary affirmance of the ALJ's decision in *Acampora*, wherein the CFTC expressly limited the precedential value of the ALJ's decision:

> Upon consideration of the briefs and the record as a whole, we are satisfied that the initial decision is substantially correct in result, and that no important question of law or policy has been raised on appeal. Accordingly, we have determined that the initial decision should be affirmed without opinion.
>
> In making this determination, we do not adopt the initial decision including any rationale contained therein, as our own, and neither the initial decision nor our order of summary affirmance shall serve as Commission precedent in other proceedings. See 17 C.F.R. § 12.406(b) (1984). (emphasis added)

Acampora v. Prudential-Bache Securities Inc., CFTC No. 84-R486, 1988 WL 228951 (C.F.T.C. Oct. 7, 1988). Insofar as the CFTC has determined that the ALJ's "initial decision . . . shall [not] serve as Commission precedent in other proceedings" (*id.*), it certainly should not be considered to establish a conflict among the courts and the CFTC justifying Supreme Court review.

The Petitioners have failed to point to any legitimate conflict between the decision of the Third Circuit in this

matter and any other court of appeals or the highest court of any state. Nor have the Petitioners established any other basis for this Court to grant their petition. Accordingly, the Petition should be denied.

II. The Petitioners' Arguments Ignore The Lower Court's Findings That They Have Failed To Allege Sufficient Facts To State A Claim.

In the petition, as they have throughout this litigation, Petitioners fail to focus on the critical deficiency in their Complaint. As the District Court and the Third Circuit concluded, the Petitioners have failed to allege facts sufficient to state any cause of action against the FCM Defendants. In particular, the courts below have found that

- "[T]here are no allegations that defendants had any contact with [Petitioners] to solicit business or provide advice. Considering the absolute absence of a relationship between [Petitioners] and defendants, this Court cannot find that defendants' actions created an unreasonable risk of harm to [Petitioners] or that the injury to [Petitioners] was foreseeable in the instant case." (Pet. App. 78a)

- "[T]he lack of relationship between the [Petitioners] and [the FCM Defendants] forecloses the possibility that a fiduciary duty existed between them." (Pet. App. at 75a)

- The FCM Defendants are not alleged to have acted with any intent to further the violations of the CEA by Messrs. Kohli and Ramchandran and Sigma. (Pet. App. 29a)

Thus, whatever theory Petitioners have pursued or hope to pursue, the facts remain that (a) their relationships were with the wrongdoers, Messrs. Kohli and Ramchandran and Sigma, not with the FCM Defendants; (b) the FCM Defendants did not owe a duty to the Petitioners, did not create an unreasonable risk of harm to the Petitioners and could not foresee a risk of harm to the Petitioners and (c) the FCM Defendants did not act with any intent to further the wrongdoing of Messrs. Kohli and Ramchandran and Sigma. These facts must be fatal to any claims by the Petitioners against the FCM Defendants.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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